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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1625

IMAGE CARRIER CORPORATION, et al., *Petitioners,*

-against-

ABRAHAM D. BEAME, Mayor of New York City, et al., *Respondents.*

HOUSE OF LITHOGRAPHY, INC., et al., *Petitioners,*

-against-

ABRAHAM D. BEAME, Mayor of New York City, et al., *Respondents.*

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*, THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MOTION OF AMICUS CURIAE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The National Right to Work Legal Defense Foundation respectfully moves pursuant to this Court's Rule 42 for leave to file its brief *amicus curiae* in support of the Petition for a Writ of Certiorari. Consent was sought from all parties. Image Carrier Corporation and the City of New York gave its consent to the filing of this brief. The Intervenor has not. The consents of the Petitioner and the Respondent have been filed with the Clerk.

The accompanying brief urges this Court to grant the Petition for a Writ of Certiorari to the United States Court of Appeals in the matter of *Image Carrier Corporation* v. *Beame*, 567 F.2d 1197 (2nd Cir. 1977).

The National Right to Work Legal Defense Foundation is a nonprofit, tax exempt organization, existing for the sole purpose of protecting the right to work, freedom of association, and other fundamental liberties of ordinary working men and women where these basic rights are infringed by unconstitutional or other illegal practices in connection with compulsory union membership.

The National Right to Work Legal Defense Foundation is vitally interested in aiding all employees whose human and civil rights are threatened or abridged through the injustices arising out of compulsory unionism arrangements. Thus, it is concerned with the protection of the legal right of an employee to work for an employer who has no contract with a union because that employee, along with his fellow employees, does not wish to belong or pay dues or a service fee to a union for unwanted representation.

When a public agency is permitted to restrict the awarding of contracts for public work to companies with union contracts, then it is apparent that the nonunion employee who works for the nonunion employer is adversely affected by this exclusion. He is in actuality denied employment opportunities because of the exercise of his right to remain nonunion.

Accordingly, the National Right to Work Legal Defense Foundation representing the interests of nonunion employees requests leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE,* THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTEREST OF *AMICUS*

The National Right to Work Legal Defense Foundation is a nonprofit, tax exempt corporation, the sole purpose of which is to provide free legal assistance to employees whose civil rights have been abridged as a result of the injustices arising from compulsory unionism. This case has great significance to all nonunion employees in every industry where a public works project could be limited to union member employees. The interests of the *amicus curiae* are set forth in detail in the preceding Motion for Leave to File this Brief.

ARGUMENTS IN SUPPORT OF GRANTING THE PETITION FOR WRIT OF CERTIORARI

1. Importance of This Case.

This case holds great significance to each and every employee of a nonunion printer in New York City. These employees, in exercising a right to work without union membership, are in actuality being punished for that action in that their employer is being refused the right to do work for the City of New York.

The right of an individual to chose his own private associations has been firmly established in the fabric of our constitutional law. *See e.g. NAACP* v. *Button,* 371 U.S. 415 (1963); *Scales* v. *United States,* 367 U.S. 203 (1961); *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U.S. 293 (1961); *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960); *NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449 (1958).

Membership in a labor union obviously entails an association of the most literal variety. And as the Court of Appeals set forth in *Hanover Township Federation* v. *Hanover Community School Corp.,* 457 F.2d 456 (7th Cir. 1972), from the constitutional perspective, "there is no reason to distinguish a union from any other association." Just as there is a constitutional right of association, i.e., the right of the individual to organize and join labor organizations,[1] there is also a constitutional right of non-association. *See Evans* v. *Newton,* 382 U.S. 296 (1966) and *Illinois State Employees Union* v. *Lewis,* 473 F.2d 561 (7th Cir. 1972), *cert. denied,* 410 U.S. 928 (1973). Consequently, it follows

[1] *Thomas* v. *Collins,* 323 U.S. 516 (1945) and *Orr* v. *Thorpe,* 427 F.2d 1129 (5th Cir. 1970).

that an employee who chooses not to associate with a labor organization is entitled to the same constitutional protections as the employee who exercises his freedom to join such a group.

If the decision in the Court of Appeals is allowed to stand, employees would be forced to choose the union as their representative in order to work on public printing jobs for New York City. Furthermore, their employer could only obtain or bid on contracts from the city, if that employer forced union representation on the employees.

2. The Court of Appeals Erred in Failing to Recognize the Legal Rights of Employees.

The practices of the City of New York and the mayor's office in restricting the bidding and awarding of contracts to union organized printers, conflicts with those rights guaranteed to all employees by Section 7 of the National Labor Relations Act, 29 U.S.C. Section 157. Section 7 provides:

> Employees . . . shall also have the right to *refrain from any or all such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 158(a)(3) of this title. (Emphasis added.)

In the case before this Court, the City will only award printing contracts to those companies who are authorized to affix the union label. Those employees, who work for an employer and who have chosen not to join or be represented by a labor organization, are denied the opportunity to work on projects arising under these contracts because their employer is denied the opportunity to bid or accept a contract financed by

public tax money. This prohibition arises solely as a result of the employees' exercise of their protected rights under Section 7. The opinion of the majority of the Court of Appeals is completely without basis when it is stated that the effect on the exercise of the employees' rights is minimal under the application of the City's policy toward granting contracts to those printers who can affix the union label.

3. The Union-Only Policy Is Totally Unrelated to Any Legitimate State Interest.

As noted by the dissenting opinion of Judge Anderson, the evidence in the case points to a violation of the "equal protection clause" of the Constitution in that there is no legitimate, articulated state purpose for differentiation between the union and nonunion printing firm. *McGinnis* v. *Royster,* 410 U.S. 263 (1973). The test as set forth by this Court in *Dandridge* v. *Williams,* 397 U.S. 471, 487 (1970) is "that the state's action be rationally based and free from invidious discrimination." The policy of the City in this case clearly does not meet this test. This Court reaffirmed that test in *New Orleans* v. *Dukes,* 427 U.S. 297 (1976).

The stated purpose of the executive order establishing the union label award of contracts grew out of the high unemployment during a severe depression. In the preamble to the Executive Order on April 12, 1934, it was said:

> Resolved that in order to lend the greatest measure of aid and assistance during the present economic depression to those citizens of our city engaged in the various branches of the printing industry, the following provisions be made a part of each and every contract and open market order issued by the Board of City Record.

It would appear that this policy was enacted to alleviate the high rate of unemployment that was present in the printing industry in 1934 in New York City. The evidence is clear that there is no further explanation or purpose set forth in any other executive decision continuing this restrictive practice, and no mention has ever been made of the desire to promote collective bargaining by this "union shop only" policy.

New York Labor Law, Section 77 is designed to promote collective bargaining, but contained in that section is no provision that would preclude a nonunion employer from bidding on public works contracts. The New York Labor Relations Act was not passed until 1940—six years after the issuance of the prounion resolution at issue in this case. In fact, New York General Municipal Law, Section 103, states a policy that contracts for public works, including printing contracts, are to be awarded to the lowest responsible bidder. That bidder has been held to be nonunion as well as union shop. *Apex Indust. Const. Corp.* v. *Village of Lake George,* 31 A.D.2d 670, 295 N.Y.S.2d 548 (1968), and *Long Island Signal Corp.* v. *County of Nassau,* 51 Misc.2d 320, 273 N.Y.S.2d 188 (1966). Thus, it would follow that agencies of the State of New York could not lawfully refuse to award a contract to a bidder solely because that bidder employed nonunion workers. In fact, the only criteria to be used must be "the lowest responsible bidder." If "the lowest responsible bidder" is the only criteria to be used, then there is equal protection of the laws because the rights of all persons rest upon the same rule under the circumstances, and there is equality of opportunity. *Walker* v. *Board of Supervisors,* 224 Miss. 801, 81 So.2d 225, *cert. denied,*

350 U.S. 887 (1955). But to arbitrarily base the award of contracts on union affiliation would clearly be a violation of the equal protection clause.

In the case at bar, the City has never shown that the City's ban on the use of nonunion labor in performing certain public printing contracts bears any relationship to a state interest in collective bargaining or the promulgation of any labor policy of the state or city. It can serve no state or public interest for the City's regulations to promote the interests of labor organizations by forcing printing shops to unionize their employees in order to qualify for City contracts. Absent any public interest, the only qualifications that can be put on the bidding and awarding of contracts must be reasonably related to the job to be performed.

CONCLUSION

For the above reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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